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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-8

UNITED STATES OF AMERICA, PETITIONER

vs.

HERMAN RADDATZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AMICUS CURIAE OF THE CHICAGO COUNCIL OF LAWYERS.

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INTEREST OF THE AMICUS ON THIS APPEAL.

Amicus, the Chicago Council of Lawyers, was founded in 1969. It was born out of a widespread belief among many Chicago lawyers that the unsatisfactory condition of the state and federal benches in Chicago called for vigorous public efforts from the bar toward their improvement.[1] Candid public

1. The origins of the Council are explored in Powell, Anatomy of a Counter-Bar Association: The Chicago Council of Lawyers, 1979 American Bar Foundation Research Journal, pp. 501-541.

evaluation by Chicago bar groups of judges' performance was unheard of when the Council began. The Council promptly undertook such evaluations, and they have continued to be its central work. Those evaluations have drawn nationwide attention and praise.[2]

The Council's interest in this appeal arises from its activities to improve the personnel and procedures of the federal district court in Chicago. The Council has worked closely with United States Senators responsible for proposing nominations for judge. In 1972, the Council developed an unprecedented survey of lawyers, based on formal statistical methods, to evaluate local federal judges. In 1976, the Council repeated that survey, using more sophisticated statistical and surveying techniques, and it expanded the survey to evaluate magistrates as well as judges. See Chicago Council of Lawyers, Federal Judicial Survey: Results of a Survey of Lawyers Concerning the Performance of Judicial Officers in the United States District Court for the Northern District of Illinois (1976). This survey was repeated in 1979, with further improvements.

In the course of these activities, the Council has become particularly concerned with the federal magistrates of the district court in Chicago. The Council's 1976 survey evaluated the three then-sitting magistrates, at a time when they had far fewer responsibilities than they do now. Less than half the responding lawyers rated any of the three as qualified for advancement to district judge. The poorest rating was received by Magistrate Carl Sussman, who heard respondent Herman Raddatz's motion to suppress; only 22% of responding lawyers found him qualified

2. See, *e.g.*, Maddi, Judicial Performance Polls (American Bar Foundation 1977), pp. 24-25; *Congressional Record*, June 22, 1976, S. 1 (remarks of Senator Percy). The Senator called the Senate's attention "to the work that has been done by a relatively young but very influential and prestigious bar association [the Council] to provide those of us involved in the selection of Federal judges with valuable information about their performance on the bench. It is a contribution to the strengthening of the Nation's judicial system worthy of emulation."

for advancement to district judge. In 1979, with the consent of the district judges, the Council evaluated the "finalists" for a fourth magistrate's position and found the person ultimately selected, John W. Cooley, unqualified because of insufficient legal experience.

In view of this history, the Council has opposed the recent movement to allow judges to delegate significant powers to the magistrates. The Council submitted those views to Congress in the course of hearings in 1977 on expansion of magistrates' powers. See Hearings on Magistrates Reform Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 95th Cong., 1st. Sess. (1977), p. 389. The Council does not oppose magistrates doing pretrial tasks that do not affect litigants' substantial rights. But to the extent magistrates are given the power to conduct proceedings that can dispose of cases, the Council frankly views that as disastrous. After years of work by many concerned legislators, citizens' groups and organizations like the Council, the caliber of the federal judges in Chicago has steadily improved and is now a credit to the federal judiciary. But there has been no such improvement, in the Council's view, as to the magistrates. This year, the district judges reappointed all three magistrates despite the Council's continuing criticism, and appointed a fourth deemed unqualified by the Council.

Because of these considerations, the Council regards the assignment to magistrates of hearings on motions to suppress, without the right to a *de novo* hearing before a judge, as a serious blow to the defense of criminal defendants. For the reasons that follow, the Council also believes that such assignment is unconstitutional.

SUMMARY OF ARGUMENT.

The Magistrates Act, as interpreted by the Government, permits the district judge to assign to a magistrate the evidentiary hearing on a motion to suppress, and to refuse the defendant's request to hold a *de novo* hearing even when the magistrate's recommended decision depended on the credibility of witnesses. This interpretation results in an unconstitutional classification that violates the equal protection guarantee of the Fifth Amendment.

Under the Government's interpretation of the Magistrates Act, the district judge is required personally to conduct any proceeding that can be dispositive of a case—except for the category of cases in which those accused or convicted of crime assert that their constitutional rights have been violated. In such cases, the statute allows the district judge to escape responsibility, by giving it to a magistrate, for performing the critical task, which in these cases is the hearing of live testimony. Because this classification is triggered by the attempt to claim specific constitutional rights, it can be justified under this Court's equal protection decisions only by a compelling governmental interest. No such interest exists here. In fact, the classification is without rational basis and fails even the loose standard of review used in equal protection cases that do not implicate the exercise of constitutional rights.

This is so for five reasons. First, the classification assigns to an inferior decision-making procedure precisely those rights that enjoy the highest stature under our law. Second, the classification assigns to inferior decision-makers a category of determination whose sensitive, controversial and potentially unpopular character calls for the most qualified available decision-maker rather than the least. Third, the classification inexplicably gives second-class treatment to criminal as compared to civil cases,

when due process demands the opposite result. Fourth, the classification irrationally assigns to lesser judicial officers that class of evidentiary rulings that has the greatest potential to dispose of litigation. Fifth, magistrates are a particularly inappropriate group to be deciding motions to suppress, because their preliminary duties in criminal cases accustom them to cooperate with, and acquiesce in, the *ex parte* requests of the very law enforcement officers whose credibility is at stake in motions to suppress.

No defensible reason justifies this classification, much less the compelling governmental interest required by this Court's equal protection cases. In particular, "saving the court's time" cannot justify the curtailment of procedures for determining criminal defendants' constitutional rights. Moreover, if district judges heed the Magistrate Act's requirement of a *"de novo* determination", the process will use more judge's time than it would take the judge to hold the hearing himself; yet, because the judge has not seen and heard the witnesses, it will lead to a less reliable result.

ARGUMENT.

IF INTERPRETED AS THE GOVERNMENT CONTENDS, § 28 U. S. C. § 636(b)(1)(B) WOULD DENY CRIMINAL DEFENDANTS THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FIFTH AMENDMENT.

The Council concurs in the Seventh Circuit's due process analysis and in the arguments by respondent here for affirmance. Moreover, the Council believes that this Court must affirm for another reason not cited by the Seventh Circuit. If interpreted as the Government asks, the Magistrates Act would deny the equal protection of the laws to criminal defendants who assert their constitutional rights through motions whose resolution depends on the credibility of witnesses.

The Government takes the position that 28 U. S. C. § 636(b)(1)(B) authorizes a district judge to review a magistrate's recommended decision on a motion to suppress without hearing the witnesses *de novo*, even where the credibility of witnesses determines the magistrate's recommended decision. If so interpreted, § 636(b)(1)(B) would create a startling and utterly indefensible classification. Under this classification, all litigants except one group have the right to have the district judge personally conduct any proceeding whose outcome can force a final disposition of their case. The excepted group is those criminal defendants who assert, through a motion or petition that depends on the credibility of witnesses, that their constitutional rights have been violated. Because they are presumptuous enough to insist on the rights given them by the Constitution, they can be forced to have a magistrate conduct the crucial proceeding in the determination of those rights. The Council submits that this second-class judicial treatment of criminal

defendants' motions raising constitutional rights violates the Fifth Amendment.

A. Under the Magistrates Act, Only Criminal Defendants Asserting Their Constitutional Rights Can Be Forced to Submit to Magistrates for Potentially Dispositive Proceedings.

The unconstitutional classification created by the Government's interpretation of the Magistrates Act is clear on the face of the statute. Under 28 U. S. C. § 636, both before and after the recent 1979 amendments, a magistrate could not and cannot conduct the trial on the merits of a criminal or civil case without the consent of the parties—not even the tiniest federal misdemeanor or the most trivial fender-bender diversity suit.[1]. Hence, absent consent of the parties, the statute expressly precludes a magistrate from making any procedural or evidentiary ruling during trial that could dispose of the case or from being the finder of fact on the merits. At trial, a litigant cannot lose his case, or fail to win it, because of a magistrate's ruling—unless, of course, he has consented to trial by magistrate.

Likewise, *with three exceptions*, no litigant can lose his case, or lose a motion that would win it, because of the *pretrial or post-trial* ruling of a magistrate. Sections 636(b)(1)(A) and (B) closely confine the jurisdiction of magistrates on pretrial or post-trial rulings that can result in judgments or force immediate dismissal of the case. The Act lists eight such proceedings: (1) a motion for judgment on the pleadings; (2) a motion for summary judgment; (3) a motion to dismiss or quash a criminal indictment or information; (4) a motion to dismiss under F.R. Civ. P. 12(b)(6); (5) a motion to involuntarily dismiss

1. *Pre-1979 Amendments:* for criminal trials, see 28 U. S. C. A. § 636(a)(3) and 18 U. S. C. § 3401(b) (1979 Supp.); for civil trials, see 28 U. S. C. § 636(b)(2) (1979 Supp.).

As amended in 1979: for criminal trials, see § 636(a)(3) and 18 U. S. C. § 3401(b), 93 Stat. 646; for civil trials, see 28 U. S. C. § 636(c)(1), 93 Stat. 643.

an action; (6) a motion to suppress in a criminal case; (7) applications for post-trial relief by convicted criminals (mainly habeas corpus proceedings); and (8) "prisoner petitions challenging conditions of confinement."[2] As to the first five of these categories, there is no risk that a litigant can lose his case, or lose a motion that would win it, because of what the magistrate does. The reason is that these motions do not require evidentiary hearings. Hence, when the judge comes to make the "*de novo* determination" that is required by § 636(b)(1)(B), he will have everything before him that the magistrate had. A truly *de novo* determination can therefore take place.

But the final three categories—motions to supress, habeas petitions and "prison condition" petitions—are different. These categories nearly always require evidentiary hearings where credibility of witnesses is crucial. And because (if the Government is right) § 636(b)(1)(B) allows the judge to refuse to hear *de novo* the witnesses on such motions or petitions, a litigant in these three categories of proceeding can indeed lose his case, or lose a motion that would win it, because of what the magistrate does. Precisely that happened to respondent Herman Raddatz. A judge reviewing the magistrate's recommended decision is *not* compelled to have everything before him that the magistrate had. If he refuses to hold a new hearing, he will lack the decisive datum—live witnesses whose demeanor and credibility can be judged. In a situation like respondent's, where the magistrate resolved conflicting testimony with an express credibility determination against the defendant, it would be altogether extraordinary for a reviewing judge, who has seen and heard nothing, to reject the magistrate's recommendation.

2. § 636(b)(1)(A) also allows magistrates to make recommended decisions on pretrial motions for injunctive relief (*i.e.*, temporary restraining orders or preliminary injunctions) and on class certification decisions. Motions for class certification have nothing to do with the merits of the case. *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 177-178 (1974); *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 466-468 (1978). Likewise, while a magistrate is allowed a recommendatory role as to preliminary injunctive relief, the trial on the merits must be held by the judge.

Thus, these three types of proceeding are the only ones in which, under the Act, a litigant can lose his entire case, or lose a motion that would win it, because of what the magistrate does. These proceedings are strikingly similar. All three involve persons accused of or already convicted of crime. And the purpose of all three proceedings is to ascertain whether such persons' constitutional rights have been violated. In these three cases, and only in these cases, can a judge divest himself of the responsibility of personally conducting a proceeding that can dispose of the case.

Being deprived of the opportunity to have a judge personally conduct these hearings constitutes a substantial setback for criminal defendants. No one regards magistrates as the equivalent of judges. As a class, they are inferior to judges in every respect. They do not have life tenure or constitutional protection against tampering with their salaries. They are paid less than judges. Their appointments have not been subjected, as judges' are, to intense scrutiny by the President and the Senate. The job carries little prestige; while federal district judgeships are avidly sought by distinguished lawyers, one is hard-pressed to think of a single well-known American lawyer who has become, or tried to become, a magistrate. For example, when the federal district court in Chicago invited applications for the new magistrate's position in 1979, it eventually chose, from among the finalists, a 36-year-old lawyer, John W. Cooley, who had been admitted to practice for only six years and who had practiced in court for only two. The Council intends no aspersion on Mr. Cooley's competence or performance. The only point made here is that if a lawyer of such limited background had been nominated for district judge, it would have provoked an uproar. (Incidentally, Mr. Cooley's qualifications at the time of appointment were impressive compared to those of another magistrate in Chicago, James T. Balog, who graduated from law school the year before

he became a magistrate. The district court reappointed him this year.)[3]

What is true in Chicago is true generally. In 1979 Congress acknowledged the relative inferiority of magistrates to judges when it amended the Magistrates Act. In this amendment, Congress reaffirmed that magistrates could conduct trials—no matter how simple and no matter how trivial the subject matter —only with the consent of all parties, and included extraordinary provisions designed to avoid pressure on the parties to give such consent. See 93 Stat. 643.[4]

This, then, is the classification created by the Magistrates Act as interpreted by the Government, among those judicial proceedings that can force the final disposition of cases. Only in a proceeding where a criminal defendant asserts his constitutional rights does the Act permit the judge to divest himself of the crucial judicial function involved in that proceeding and to delegate that function to an inferior level of judicial officer. As we now show, this classification violates the equal protection guarantee of the Fifth Amendment.

B. Under the Equal Protection Guarantee of the Fifth Amendment, the Classification Created by § 636 Is Unconstitutional.

The Fifth Amendment's due process guarantee includes a guarantee of equal protection of the laws. *Califano* v. *Goldfarb*, 430 U. S. 199, 203-205 (1977); *Weinberger* v. *Wiesenfeld*,

3. We have included, as an appendix to this brief, the current resumes of the four magistrates, which they themselves submitted to the Council.

4. Even the Attorney General conceded in 1977: "At present there is an unevenness in the ability of magistrates to perform their tasks. Many magistrates were appointed in 1971 when the magistracy was in its infancy and its tasks unclear." Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, *supra*, p. 27. Three of the four magistrates in Chicago, including the one who ruled on respondent's motion to suppress, fit the Attorney General's description.

420 U. S. 636, 638 (1975); *Schlesinger* v. *Ballard*, 419 U. S. 498, 500 (1975); *Jimenez* v. *Weinberger*, 417 U. S. 628, 637 (1974). Moreover, this Court has repeatedly held that when the challenged classification depends on the assertion of "a fundamental right explicitly or implicitly protected by the Constitution," it will be subjected to "strict judicial scrutiny." *San Antonio School District* v. *Rodriguez*, 411 U. S. 1, 17 (1973); *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 312-313 (1976); *Zablocki* v. *Redhail*, ... U. S. ....., 98 S. Ct. 673, 682 (1978); *Williams* v. *Rhodes*, 393 U. S. 23, 30-32 (1968); *Bullock* v. *Carter*, 405 U. S. 134, 142-144 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618, 634-635 (1969). In such cases, unless the classification is shown to serve a compelling government interest, and unless it is closely tailored to serve that interest, it is unconstitutional. See, *e.g.*, *Shapiro* v. *Thompson*, *supra*, 394 U. S. at 634; *Williams* v. *Rhodes*, *supra*, 393 U. S. at 31.

The classification created by the Magistrates Act must be judged under this standard. As we showed above, the classification at issue in this case hinges upon the assertion by persons accused or convicted of crime of rights explicitly guaranteed by the Constitution. These are the only persons under the Act who run the risk of having a dispositive proceeding conducted by a magistrate without the right to have it conducted again in its entirety by a judge.

This classification cannot be justified under the strict standard of review required by this Court's equal protection cases. In fact, it cannot be justified under *any* standard of review. For the following five reasons, it is wholly irrational to give magistrates the power to make a potentially dispositive determination in cases involving the fundamental Constitutional rights of persons accused of crime, while carefully preventing magistrates from making such determinations in all other categories of cases.

First, it is capricious to allow a judge to escape responsibility for conducting a potentially dispositive proceeding precisely in

those situations where the litigants' most precious rights are at stake. This classification assigns to the lowest level of federal judicial officer the crucial function in the determination of rights that rank at the top of our substantive legal hierarchy. Thus, in a diversity case for damages to his automobile, a defendant gets a judge to preside over every potentially dispositive proceeding in his case. A criminal defendant who requests a hearing to claim rights guaranteed him by the Founding Fathers gets a magistrate.

Second, the categories of proceeding entrusted to magistrates are those that in practice demand the *highest* caliber of judicial officer. Motions to suppress in criminal cases arguably expose judges to more public controversy and condemnation than does any other judicial function. Granting such motions can mean freeing a suspect who has clearly committed serious federal crimes. Such decisions demand the highest qualities of a judge—independence from the pressure of adverse publicity, freedom from insecurity about job tenure, the maturity and character to follow the law when the result may be personally repellant, and the ability to make decisive credibility determinations on the evidence in a situation where the temptation is to give routine credit to a law enforcement officer whose story conflicts with the defendant's. Nowhere in federal practice is there a more pressing need to have credibility disputes heard by the most qualified judicial officers available. Instead, under the Government's interpretation, Congress has allowed those disputes to be farmed out to the least.

Third, it is astonishing that the persons gettting the short end of the stick under this classification are precisely those accused of crime. Due process (which is the source of the equal protection right contained in the Fifth Amendment) is always interpreted more strictly in criminal cases than civil cases. Yet, under the Magistrates Act as interpreted by the Government, just the reverse situation prevails. To repeat our earlier example, a defendant in a fender-bender diversity suit has the right to have

every ruling on evidence made by a district judge, including the many evidentiary rulings that call for an *in limine* hearing of testimony. Yet a criminal defendant, who stands to go to jail depending on the ruling on his motion to suppress, can be compelled to submit to a magistrate. This is topsy-turvy. It is precisely in criminal cases where the case is strongest for requiring these proceedings to be held by the district judge.

Fourth, it makes no sense that in deciding which rulings on evidence can and cannot be made by magistrates, Congress has allowed to be delegated to inferior judicial officers precisely those rulings whose impact on a case is the most devastating. A motion to suppress evidence, after all, is only one kind of ruling among many on the admissibility of evidence at trial. Yet of all categories of evidentiary rulings, it is by far the most likely to force the immediate resolution of the case. This uniquely dispositive character of the motion to suppress has been formally recognized by requiring it to be heard in advance of trial. See F. R. Crim. P. 12(b)(3). One reason for this rule is, of course, that experience has shown that granting such a motion in the majority of cases leads to dismissing the case, making it unnecessary to prepare for trial or to empanel a jury. Thus is produced the strange and irrational state of affairs in which all evidentiary rulings on the admissibility of evidence at trial must be made solely by the district judge—except for the most important and decisive category, in which the critical proceeding is conducted by a magistrate.

Fifth, there are strong reasons to believe that magistrates are a particularly inappropriate group to be entrusted with this category of credibility determination, which always boils down to the word of a law enforcement officer against that of a criminal defendant. Much of a magistrate's time is taken up by the issuance of orders at the *ex parte* request of law enforcement officers, such as issuing arrest warrants (F. R. Crim. P. 4(c)(1)) and issuing search warrants (F. R. Crim. P. 41). Another important magistrate's task is the holding of preliminary hear-

ings, which often consist solely of law enforcement officers' testimony and which, in the overwhelming majority of cases result in a "probable cause" finding, since illegally seized evidence may be used at such hearings. F. R. Crim. P. 5, 5.1(a). Such duties are likely to bring FBI agents and other law enforcement officers before the magistrate on a regular, *ex parte* and friendly basis. That is poor training, to say the least, for the task a magistrate faces on motions to suppress. There he may be required to find that the very officer who routinely appears before him and who is routinely granted arrest warrants, search warrants or "probable cause" findings is lying under oath.

As against all these irrational aspects of the classification set up by the Magistrates Act, there is absolutely no constitutionally sufficient justification for it, much less the compelling one that is required. The only possible defense of this procedure is that refusing to hold a *de novo* hearing on these three categories of proceeding might save the district judge some time. This defense fails for three reasons.

First, "saving the judge's time" is simply not a sufficiently compelling governmental interest to justify discriminatory treatment of a criminal defendant's attempt to vindicate his constitutional rights. No decision of this Court has ever countenanced such treatment in the name of saving time. Instead, such "convenience" rationales have been consistently rejected as a justification of classifications that hinge on the attempt to exercise constitutional rights. See *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 268-269 (1974); *Shapiro* v. *Thompson*, *supra*, 394 U. S. at 643-635; *Zablocki* v. *Redhail*, *supra*, ... U. S. ....., 98 S. Ct. at 682-683.

Second, the "timesaver" rationale does not satisfactorily explain why Congress has singled out these three categories of criminal cases in which to deny the right to absolutely full review by district judges of magistrates' decisions. If Congress, in the interest of saving judges' time, is to be allowed to exempt

certain kinds of dispositive proceedings from the requirement of total review by the district judge, its choice must at least bear some relation to what is at stake in the particular proceedings it chooses. One could perhaps see such a relation, for example, if Congress had decided to let magistrates try auto accident diversity cases, subject to "*de novo* review" by the judge without a mandatory *de novo* hearing. In such a case, Congress at least could not be accused of entrusting truly important federal rights to a magistrate's determination.

Without such a requirement—that Congress's choice of proceedings on which to save judges' time bear some reasonable relation to the relative importance of the rights at stake in those proceedings—there is no limit to the damage that the "timesaver" rationale can do. If "saving judges' time", by itself, is a sufficient justification for turning certain tasks over to a magistrate, then there could be no equal protection bar to Congress turning over precisely the most important functions in the most important kinds of federal constitutional cases to magistrates. It would save plenty of judge's time, for example, for Congress to decree that all challenges to abortion statutes, or all litigation arising out of the imposition of the death penalty, should be decided by magistrates. Yet it is clear that that would violate equal protection.

In short, "saving judges' time" begs the question as a rationale for a judge/magistrate classification, for it could justify *any* such classification. Even under a "rational basis" test of equal protection, the question must be: is there any decent reason for singling out the assertion of precious constitutional rights as the category for saving judges' time? As we showed earlier, there is none.

Third, it does *not* save judges' time to delegate the hearing on the motion to suppress to magistrates. This is so for two reasons.

First, it is in the nature of criminal practice that virtually every time a defendant loses a motion to suppress before a

magistrate, he will demand review by the district judge. A criminal lawyer who fails to seek such review risks being accused of providing inadequate representation. So this referral is unlikely to relieve district judges from the ultimate decision-making responsibility in any significant number of cases.

Second, the strict reviewing responsibilities imposed on the district judge by 28 U. S. C. § 636(b)(1) are almost bound to take up more of the judge's time than it would have taken had he held the hearing himself. He must make a *"de novo* determination" of every part of the magistrate's report to which objection is taken. In the case of a motion to suppress, this requires the district judge to read, personally, the entire transcript of the suppression proceedings. Under this standard, he cannot rely on his law clerk to read the transcript and advise him whether the magistrate's recommended ruling makes sense, any more than he could have assigned his law clerk to conduct a hearing on the motion to suppress. And every lawyer who has had to review a transcript of a hearing at which he was not present knows how difficult it is to make sense of what was happening, to compare the testimony of different people on the same point, and to evaluate the significance of variations or contradictions. Yet the judge not only has to do that, but also has to form his own determinations from scratch, for the statute specifically precludes him from giving any presumptive weight to the magistrate's conclusions.

No judge can conscientiously follow these strictures without spending at least as much time as it would have taken to hold the hearing himself. And in the end, it is indisputable that the judge's decision, if truly made *de novo,* is less likely to be correct than if he had heard the witnesses himself. The result of this procedure, therefore, is no saving of time whatsoever but a less reliable result—the worst of both worlds.[5] At best, the

5. Under these circumstances, what is inevitably going to happen is that some judges will *not* conscientiously follow the statute. They *will* delegate the reading of the transcript to their law clerks and

(Footnote continued on next page.)

"potential for significantly conserving the resources of either the litigants or the judiciary is doubtful at best." *Parkland Hosiery Co.* v. *Shore,* ..... U. S. ....., 99 S. Ct. 645, 664 (1979) (Rehnquist, J., dissenting).

To sum up: the classification which, under the Government's interpretation, has been created by the Magistrates Act deprives criminal defendants who assert their constitutional rights on motions to suppress or post-conviction proceedings of the equal protection of the laws. There is no compelling governmental reason for allowing judges to escape, in this unique category of cases, the responsibility for personally conducting proceedings that can dispose of the case. Nor is there even a rational basis for such a classification. Every defendant who, like Herman Raddatz, is denied a *de novo* hearing by the district judge on a motion to suppress that depends on the credibility of witnesses has been denied the protection of the Fifth Amendment.

A final word is appropriate. The vigorous debate that the exclusionary rule has created among the public, and within this Court, is well-known. In the face of this debate, this Court has continued to reaffirm that all criminal defendants have the right under the Constitution to have illegally-seized evidence or illegally-obtained confessions barred from their trials. See, *e.g., Ybarra* v. *Illinois,* ..... U. S. ..... (November 28, 1979). This is not a popular right, and its unpopularity is reflected in the apparent attempt by Congress to allow judges to divest themselves of the hardest task that has to be done when defendants claim it. Yet it is precisely because the right asserted on motions to suppress is a controversial and politically unpopular right that the farming out to magistrates of the hearings on these motions is so indefensible. Defendants like re-

(Footnote continued from preceding page.)

they *will* give presumptive weight to the magistrate's ruling. And there will be no way for a criminal defendant to redress such shortcuts or to prove that they occurred. This inevitable curtailing of defendants' rights cannot occur if the judge hears the testimony on the motion.

spondent must be given the same first-class treatment of their efforts to claim that right that other litigants are guaranteed on rights that have no constitutional standing whatsoever.

CONCLUSION.

The decision of the Seventh Circuit should be affirmed.

Respectfully submitted,

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APPENDIX.

RESUME OF JOHN W. COOLEY

Personal Data

Name: John W. Cooley

Nickname: Jack

Address: 2646 Eastwood Avenue, Evanston, Illinois 60201

Telephone: Home: 328-7234;
Office: 435-5805

Date of Birth: October 28, 1943 Place of Birth: St. Louis, Mo.

Marital Status: Married, two children (boy, age 8; girl, age 4)

Military Status: Served on active duty for 4 years and 9 months. Honorably discharged February 26, 1970; resigned commission in the rank of Captain.

States in Which Licensed to Pratice Law:
Illinois and Missouri

Professional Organization Membership and Offices
American Bar Association

Secretary of the National Committee of Appellate Staff Counsel, Appellate Judges Conference, Judicial Administration Division of the A. B. A.

Chicago Bar Association

Other Affiliation:

Member of Board of Directors West Point Society of Chicago
Treasurer, Citizens' Zoning Committee of Evanston

Second Language:

Spanish

Travel Experience:

Visited practically every major city in the United States (covering 44 States and including Alaska and Hawaii). Studied law in London, England for one year. Spent time in many other European capitals including Paris, Madrid, Rome, Brussels, Zurich, and Berlin. Served one year in Vietnam; visited Guam and Japan.

Education

Law School:

Notre Dame Law School
J. D. May, 1973
Academic:

(1) Lead Articles Editor, Notre Dame Law Review

(2) Published two articles: 47 *N. D. Lawyer* 392, concerning the inheritance rights of illegitimate children; 48 *N. D. Lawyer* 936 regarding a proposal for trial delay indemnity. I also co-authored an article which was published in the *Insurance Law Journal* in 1973, concerning the legal liability of insurance company directors.

(3) Studied comparative and international law for a year in London, England.

Leadership and Activities:

(1) Executive Vice President, Student Bar Association

(2) Chairman, Law School Housing Committee

(3) Staff writer, law school newspaper

(4) Planner and participant in pilot program experimenting with the use of video tape in practice court to serve as the record on appeal in later moot court competition.

Undergraduate:

United States Military Academy, West Point

B. S. in Engineering, June 1965
Academic-Leadership-Activities:

(1) As the top graduating senior of my high school class, (Christian Brothers' College High School, St. Louis, Missouri, 1961), I turned down two 4-year scholarships to enter West Point. I maintained a Dean's List average during much of the time I attended the Academy.

(2) During my senior year, I was summer training company commander, and later a regular-lettered company commander. I served as an elected member of the Cadet Honor Committee for three years.

(3) During all four years at the academy I participated in the West Point Glee Club and the Dialectic Society. In my fourth year I composed the musical score for the Academy's annual musical comedy stage production, for which I received a personal letter of commendation from the Superintendent of West Point. Sportswise, I participated in company boxing, soccer, baseball, and tennis.

Employment

Legal Employment

(1) *January, 1977 to Present: Senior Staff Attorney for the United States Court of Appeals for the Seventh Circuit.* As Senior Staff Attorney I am responsible to the Circuit Judges and the Circuit Executive. My duties include, but are not limited to: assisting the Circuit Executive in supervising staff attorneys (staff law clerks) and court secretaries; screening all civil notices of appeal for the purpose of detecting jurisdictional and other defects and of selecting cases for predocketing conferences; scheduling and conducting docketing conferences with counsel in all criminal appeals and predocketing (settlement) conferences in selected civil appeals; researching complex issues of law which may arise from a particular motion; drafting

proposed opinions or orders in the more complex cases submitted without oral argument; acting as a public relations officers for the court and providing procedural information to counsel and general information to public and private groups regarding the federal court system; acting as a liaison officer between the court of appeals and the district court clerks and court reporters within the circuit; assisting the Circuit Executive in initiating, planning, and conducting studies, suveys, and experiments to determine effective methods of reducing court caseload and judicial and administrative workload and of streamlining the appellate process; assisting the Circuit Excutive in collecting, compiling, and analyzing statistical and other data with a view to the presentation of the reports based on such data as may be directed by the Chief Judge, the Circuit Executive, and the Administrative Office of the United States Courts; assisting the Circuit Executive in setting the court calendar and in assignment of panels of judges; serving as a member of the Advisory Committee on Circuit Rules.

(2) *August, 1974 to January, 1977: Assistant United States Attorney, Northern District of Illinois, Chicago.*

(a) *August, 1974—January, 1975: assigned to Appellate Division;* drafted and ultimately argued approximately ten briefs in the United States Court of Appeals for the Seventh Circuit. These briefs addressed issues relating to both civil and criminal law, including federal removal jurisdiction, extortion as a defense to bribery in a Travel Act prosecution, selective prosecution, admissibility of computer printout tax records under government records exception to the hearsay rule, speedy trial, conspiracy, prior and subsequent similar conduct, propriety of various jury instructions. During this time I attended a two week trial advocacy course conducted by the United States Department of Justice in Washington, D. C..

(b) *February, 1975—August, 1975: assigned to Criminal Receiving and Appellate Division;* continued drafting and arguing appellate briefs; handled a multitude of criminal matters in the magistrate courts; tried five criminal cases, (two narcotics cases; two counterfeiting cases; one theft from interstate shipment), in the federal district court; handled numerous other matters in the federal district court including arraignment and plea and sentencing hearings, mental competency hearings, parole and probation revocation hearings, and *Brady* and newly discovered evidence hearings.

(c) *August, 1975 to January, 1977: assigned to Civil Division* of the United States Attorney's Office, and carried a caseload of sixty cases, on the average. These included tort cases (e.g. medical malpractice, trespass in connection with HUD foreclosure, improper weapons screening of carry-on luggage by airlines, alleged negligence of O'Hare air traffic controllers); Civil rights cases (e.g. HUD housing regulations, HEW regulations regarding secondary school female athletic programs, alleged conspiracy by FBI and CIA to violate individual rights, alleged conspiracy by the U. S. Postal Service to violate employment rights; class actions against INS officers regarding their right to stop and interrogate aliens.); Immigration and Naturalization cases; Vehicle Forfeiture cases; multi and single family HUD mortgage foreclosure actions; bankruptcy cases; IRS tax lien assessments and foreclosures; contract disputes; Social Security disability and black lung cases; labor cases; civil fraud cases. I received the Department of Justice's Special Achievement Award on December 13, 1976.

(3) *September, 1973 to August, 1974: Law Clerk to the Honorable Roger Kiley, United States Court of Appeals for the Seventh Circuit.* A portion of my time was devoted to Staff Law Clerk duties involving the review, researching, and presentation for decision of various motions to the

active judges on the Court. During this time I supervised the preparation of the first Manual for Staff Law Clerks, consisting of approximately 200 pages of instructions, checklists, and sampe motions and orders.

(4) *Legal Employment During Law School (1972-73 School Year: Law Clerk, Insurance Section of the Associates Finance Corporation's Legal Department, South Bend, Indiana.* My chief function was to review recently enacted state insurance legislation to determine its impact on company operations and then prepare memoranda for dispatch to the affected branches. Additionally, I was required to review claims on disability policies where there was a suspicion of pre-existing physical or mental conditions. Finally, I conducted several legislative surveys related to state rules on cancellation, suspension, and renewals of automobile insurance policies.

Non-Legal Employment:

Assistant Manager of Hotel:

For a period of six months subsequent to my release from active duty and prior to my commencing law school, I served as the assistant to the General Manager and Sales Representative of a 200-room hotel in South Bend, Indiana. Generally the job consisted of supervising the operation of the front desk, dining room, coffee shop, bar, and maintenance department. I had full responsibility for the preparing for conventions and the handling of reservations. In addition, I acted as sales representative for the hotel, meeting with many directors of major concerns in the area to promote business.

Military Experience:

(1) Military Schooling:

Attended Airborne and Ranger Schools at Fort Benning, Georgia graduating in December of 1965; Missile Officer Basic Course, August, 1965, Vietnam Orientation Course,

September, 1967; Computer Programing Methods, June, 1969.

(2) Leadership:

(a) *Missile Platoon Leader:* involved the supervision, control, and training of approximately 35 individuals and the direct responsibility for several million dollars worth of government property, including the security and maintenance of sensitive nuclear warheads.

(b) *Battery Commander:* entailed the supervision, control, and training of approximately 130 individuals. As a missile battery commander in the United States, I had the direct responsibility for providing round-the-clock air defense protection for the St. Louis area. In 1966, the battery which I commanded achieved an exceptionally high performance rating during actual missile firings at White Sands, New Mexico. As a 175mm artillery battery commander in Vietnam, I was responsible for providing defense, offensive, and harassing fires in the area of the Demilitarized Zone. My battery was influential in suppressing the North Vietnamese advance on Khe Sahn during the 1968 Tet Offensive.

(3) Administration and Management:

Adjutant: As a battalion adjutant in Vietnam, I was the administrative and personnel chief of a field artillery unit consisting of over 600 men. Among the duties discharged in this position were: drafting of all official correspondence for the commander, conducting assignment interviews, coordinating the commander's activities, and handling all correspondence and coordination in conjunction with courts-martial. As a group adjutant in the United States, I served in the capacity of administrative and personnel chief of an air defense artillery unit consisting of more than 700 men. Among the duties performed in this position were: acting as the personal representative of the

commander in his absence, interviewing candidates for prospective job assignments, organizing and coordinating non-commissioned officer promotion boards, editing a unit newspaper, serving as a member of the tribunal in courts-martial, and acting as a consultant in any matters pertaining to the health, morale, or welfare of the unit's members. In addition, I organized, and together with the commander, conducted two Operation Understanding tours to Ft. Bliss, Texas and to the Headquarters of the Army Air Defense Command in Colorado Springs. The purpose of this program was to acquaint prominent St. Louis officials and businessmen with the operation of the Army Air Defense Command.

(4) Coordination:

Air Observer, Vietnam: involved the delicate and difficult task of coordinating and directing field artillery fires, jet air strikes, and naval gunfires on suspected and verified targets within the Demilitarized Zone and within the close vicinity of friendly troop dispositions.

(5) Academic:

Nuclear Weapons Instructor: entailed the preparation and presentation of instruction regarding nuclear weapons characteristics, methods of employment, and target analysis to career course officers. I had the rare distinction of being designated a Level I instructor upon completion of the instructor training course, a prerequisite to the teaching position. This duty assignment required a top secret security clearance.

(6) Recognition:

Decorations: Bronze Star Medal, Air Medal, Two Army Commendation Medals.

References

The Honorable Thomas E. Fairchild

United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

The Honorable Luther M. Swygert
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Mr. Collins T. Fitzpatrick
Circuit Executive
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Mr. Thomas F. Strubbe
Clerk
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

JAMES T. BALOG

James T. Balog was born in Watertown, South Dakota, May 12, 1932. He presently resides at 1555 North Dearborn Parkway, Chicago, Illinois, 60610, and is married to the former Nancy McDonnell.

BBA from the University of Michigan, 1954.

JD from the John Marshall Law School, 1970.

He was appoined a United States Magistrate on March 12, 1971.

His previous employment was that of United States Commissioner, 1967-71; Deputy Clerk, U. S. District Court, 1962-67;

Private Industry, 1954-62 (including time in the United States Air Force as a jet fighter pilot, 1955-57).

He was the President of the Chicago Chapter of the Federal Bar Association (1978-1979), currently a member of that assoc., and the Bar Association of the Seventh Federal Circuit; a past President of the University of Michigan Club of Chicago (1972-1973); first President of the Village of Carol Stream, Illinois (1959-1962).

He has participated as a faculty member of the Federal Judicial Center at seminars for newly appointed Magistrates—Indianapolis, Indiana and Rapid City, South Dakota in 1972; Atlanta, Georgia in 1973; and Washington, D. C. in 1975.
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CARL B. SUSSMAN

Biographical Sketch

Professional and Bar Association Activities

Carl B. Sussman was appointed United States Magistrate for the United States District Court, Northern District of Illinois, on March 12, 1971. Prior to that time he was engaged in the private practice of law. He was a member of the Board of Managers of the Chicago Bar Association (1964-1966), and is a past Chairman of the Association Meetings Committee. He has served on approximately 20 Bar Association committees, including Grievance, Candidates, Judiciary, Inquiry, and Juvenile Delinquency.

Posts of Honor and Public or Quasi-Public Offices

Sussman served as a member of the Illinois Parole and Pardon Board to which he was first appointed in 1965 and reappointed in 1967. During that same period he also served as a member of the American Correctional Association and the Association of Paroling Authorities. Also, in 1965, he was appointed a member of the Board of Directors of the House of Correction of the City of Chicago, and on January 1, 1970, was appointed

a Director of the Cook County Department of Corrections where he served until his appointment as United States Magistrate.

Education

Sussman graduated from Chicago-Kent College of Law, a division of the Illinois Institute of Technology in February 1937, awarded the Degree of J.D., and was admitted to the Illinois Bar on April 15, 1937.

Awards and Publications

In 1950 Sussman received the Distinguished Service Award from the Decalogue Society of Lawyers and served as its President in 1951. In 1962 he received the Certificate of Appreciation for 20 years of service to the nation from President John F. Kennedy. In 1974 the Chicago Bar Association awarded him its Certificate of Appreciation for service to the Organized Bar and the Association as Chairman of the Association Meetings Committee. He is the author of a number of legal articles published by the Chicago Bar Association and the Decalogue Society, and has lectured before legal groups.

On November 21, 1978, Sussman participated in a Federal Practice Seminar at the Chicago Bar Association with panelists that included Judge Prentice H. Marshall of the U. S. District Court, Judge Wm. J. Bauer of the U. S. Court of Appeals, and H. Stuart Cunningham, Clerk of the U. S. District Court. On June 15, 1979, the Chicago Bar Association presented him with its Certificate of Appreciation for his contribution in improving Bench and Bar relations.

OLGA JURCO

Biographical Information

Name:

Olga Jurco, United States Magistrate, Northern District of Illinois 2402 Dirksen Building, 219 South Dearborn, Chicago, Illinois 60604—435-5638.

Education:

De Paul University, College of Commerce, B. S., College of Law J. D.

Law Experience:

General law practice after admission; Senior Law Clerk to Judge Walter La Buy, U. S. District Court 1944 until his retirement; Senior Law Clerk to Judge Richard B. Austin, U. S. District Court, September 1961 to March 1971. Appointed U. S. Magistrate for Northern District of Illinois March 12, 1971.

Membership in Professional Societies:

Federal Bar Asociation, Chicago Chapter

Women's Bar Association of Illinois

Chicago Bar Association

Illinois State Bar Association

Bar Association, Seventh Federal Circuit

American Judicature Society

Kappa Beta Pi Legal Sorority

Publications:

Chicago Bar Record, February 1973, "The United States Magistrate—A Transition Period."

Special Appointments:

Appointed July 1975 by Chief Judge Parsons as the United States Magistrate member of the Northern District of Illinois Court's Planning Group (Commission) on the Speedy Trial Act of 1974; Chairman of its Sub-Group on Systems and Procedures.

Awards:

Milton Gordon Award from Chicago Chapter, Federal Bar Association, June 1973 "for excellence and merit among government lawyers at the staff level."

Panel Member at Judicial Center Seminars:

Seminar for U. S. Magistrates, Title VII, Equal Employment Opportunity, Denver, Colorado, November 1973.

Seminar for U. S. Magistrates, Dispositive Motions and Report Writing, Atlanta, Georgia, April 1977; San Francisco, California, June 1977; Chicago, Illinois, September 1977.

Seminar for Chief Probation Clerks, Relationship between Probation Office and U. S. Magistrate, Chicago, Illinois, July 1974.

Seminar for Pretrial Service Officers, Relationship between Pretrial Service Office and U. S. Magistrate, Cincinnati, Ohio, July 1978.

Public Appearances as U. S. Magistrate:

American Bar Association, Law Student Division, April 1976.

Federal Bar Association, Chicago Chapter, June 1972.

Women's Bar Association of Illinois, October 1973.

John Marshall Law School Class for Advanced Federal Practice and Procedure, March 1973.

Military Law Committee of the Chicago Bar Association regarding Magistrate Court at Military Bases, December 1977.

Immigration and Naturalization Service, National Anti-Smuggling Program Seminar, January 1978.